MOTION FILED JUN 7 1957
LIBRARY SUPREME COURT, U.S.

No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1956

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED BY THIS COURT ON THE MERITS ON MAY 13, 1957

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING AND

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF SAID PETITION FOR REHEARING, TO BE CONSIDERED IN CASE SAID MOTION FOR LEAVE TO FILE BE GRANTED.

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING

The Association of American Railroads (hereinafter referred to as "the AAR"), on behalf of its entire membership, hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of petitioner's petition for rehearing. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondent has been requested but refused. Hence this petition is filed under Rule 42 (2) and (3).

The AAR is a voluntary, unincorporated, non-profit

organization composed of member railroad companies operating in the United States, Canada and Mexico. Full membership is open to all Class I railroads (and to certain other railroads) and there is provision for associate membership.

There are at present 186 full members and 164 associate members of the AAR. The Class I member railroads operate over 99 percent of the total railroad mileage of Class I railroads in the United States and have gross operating revenues of over 99 percent of the total Class I operating revenues in this country. The activities of the AAR cover a wide range having to do with such matters as research, operations, car service, traffic, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

The AAR, as the joint representative and agent of these railroads in connection with all Federal legislation, has a definite interest in all significant developments that enlarge the scope or extent of the Federal Safety Appliance Acts, 45 U.S.C. § § 1-16. This interest is based upon a concern for the welfare of the railroad industry as a whole, and is not confined to the specific facts of any particular litigation.

It is understood that the petitioner, The Baltimore and Ohio Railroad Company, will make timely filing of a petition for rehearing in which it will pray this Court to reconsider and modify its opinion and judgment herein of May 13, 1957. The AAR, if this motion for leave to file a brief *amicus curiae* in support of said petition for rehearing be granted, does not intend to ask this Court to give further appraisal to the facts

in evidence herein, or to particularities of contentions and arguments heretofore made by the petitioner and the Interstate Commerce Commission when the case was originally argued on the merits. We wish instead to present certain additional considerations which will demonstrate the radical consequences of the decision for the railroad industry and the great desirability from the viewpoint of the railroads and all who work for them that it be reconsidered and vacated and that the decision of the Court of Appeals be reversed. We desire to emphasize to the Court that the decision will have the force, effect, and character of new and unexpected legislation, being in substance a new statute. We are obliged to say that it is legislation that finds the industry wholly unprepared and that will create enormous problems of compliance to which no one concerned with the Safety Appliance Acts—the railroads, the Interstate Commerce Commission, the labor organizations representing maintenance-of-way employees, and the manufacturers of safety appliances—has previously given thought. We shall stress that the end objective of the Safety Appliance Acts, namely, railroad safety, will be impaired.

It is unreasonable to assume that Congress would have intended such drastic consequences as will result from the Court's decision. From a revolutionary result it is necessary to reason backwards to an absence of Congressional purpose in the beginning.

Mindful of the many demands on the Court's time, we hope to submit in the smallest possible compass certain additional reasons, new to this case in substance or emphasis, why the judgment below should have been reversed.

Wherefore, your movant respectfully prays that

this motion be granted and presents and files its separate brief *amicus curiae,* bound together with this motion, upon which it will rely if the present motion be granted.

Respectfully submitted,

GREGORY S. PRINCE
PHILIP F. WELSH
EDWARD G. HOWARD
Counsel for the Movant,
The Association
of American Railroads

June 7, 1957

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING.

I

INTEREST OF *AMICUS CURIAE*

A concise statement of the interest of The Association of American Railroads is set out in the preceding motion for leave to file this brief, as required by Rule 42 (3). Instead of repeating that statement here, we refer to that statement and ask that it be considered as incorporated here by reference and as proper compliance with Rule 42 (5) requiring that a brief *amicus curiae* "set forth the interest of the *amicus curiae*, * * *."

II

ARGUMENT

POINT 1

THE DECISION DEFEATS THE PURPOSE OF THE SAFETY APPLIANCE ACTS BY INCREASING THE HAZARDS OF RAILROAD OPERATIONS AND THEREFORE CONSTITUTES A DEPARTURE FROM A MAJOR PRINCIPLE THAT FORMERLY GUIDED THIS COURT.

The members of this Court are not divided as to the broad purpose of the Safety Appliance Acts. Both the opinion of the Court and that of the dissenting Justices explicitly recognize that these Acts are designed primarily to protect employees and others from the hazards that arise from dangerous or defective railroad equipment. This is not a case, then, where the basic purpose or "intent" of Congress is obscure or can be found only in tenuous inferences from reports or debates. The purpose here is plain and it is undisputed.

Does the Court's decision advance this purpose or tend to defeat it? We think the latter and we therefore think the decision departs from a major principle by which this Court has always been guided. It has always considered itself bound to interpret statutes in accordance with a clear legislative purpose so as to effectuate that purpose. "The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States* v. *Champlin Refining Co.*, 341 U.S. 290, 297 (1951).

This approach—that of interpreting statutory language in the manner that best comports with the purpose of the act and best prevents the evil sought to be

prevented—has been relied on by this Court in interpreting the very Acts under which this case arose. In *Pennell* v. *Philadelphia & R. Ry.*, 231 U.S. 675 (1914), for example, this Court held that a locomotive tender need not have automatic couplers at both ends (despite the literal language of the 1903 Amendment to the Safety Appliance Acts requiring all "tenders" to have "couplers") because "the purpose of the statute," that of "safety in making and unmaking the connections," could not have been aided by requiring automatic couplers to be placed between locomotives and tenders.

In the present case, this Court has done just the opposite of what it did in the *Pennell* case: it has to an extent nullified the purpose of Congress, not furthered it, by forcing railroads—in the name of "safety"—to make their maintenance-of-way vehicles *more* dangerous than they were before.

The chief ways in which railroad safety has thus been impaired are clear. They can be summarized as follows:

1. The increased weight of track cars that will result from addition of such "safety devices" as train or power brakes, automatic couplers, standard drawbars and the like will make it difficult or perhaps impossible for such vehicles to be lifted from the track by the crews aboard them, which normally consist of three or four men (R. 78). The decision thus *increases* the prime danger that track cars will be hit by trains that must pass over the same track (*cf.* R. 42).

2. A train brake system extending from a motor track car to one or more push cars behind it necessitates connecting appurtenances such as air hoses. This will make the vehicles as a group considerably more diffi-

cult to remove from the tracks quickly, regardless of increased weight, since the brake appurtenances must first be disengaged.

3. Installation of power or train brakes on maintenance-of-way vehicles would conduce to sudden stops. The crews of these vehicles would therefore be subjected to far greater risks than exist at present of being thrown from the vehicles and thus of sustaining the very type of injury that forms the basis of this case (R. 65).

Nothing to be found in the record or in the Court's opinion permits an inference that the decision can have the effect of fostering railroad safety.* The affirmance tends to defeat the acknowledged purpose of Congress. It should therefore be vacated.

POINT 2.

THE COURT WAS NOT ADVISED OF THE EXISTENCE OF THE ACT OF JULY 18, 1866 AND THEREFORE MISCONSTRUED THE LANGUAGE OF § 8.

The opinion of the Court lays great stress on the language of 45 U.S.C. § 8 that in terms extends the Safety Appliance Acts to "all trains, locomotives, tenders, cars, and similar vehicles." The Court characterized these words as language that "could not have been more all inclusive." In consequence it held track motor-cars to be included thereunder.

The fact is, however, that the language *could* have been considerably more all inclusive conformable to a statute some 37 years old in 1903, but not hitherto brought to the Court's notice in this case. The Act of

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* Any improvement in stopping time that might result from train brakes would be at least offset, if not overbalanced, by the increased risks attendant on sudden stops.

July 18, 1866 (14 Stat. 178; R.S. § 4) provided that when used in an act of Congress

> "The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land."

If, therefore, Congress had wished to include maintenance-of-way cars among the conveyances subject to the Acts, it would have used simply the "all inclusive" word "vehicles" to which it had long before given the broadest possible definition for the very purpose of use in statutes. The use of the phrase "all track vehicles" in § 8 would have comprehended track cars, hand cars, push cars and every other conceivable conveyance that might be operated over the tracks of a railroad.

But Congress did not use this ready-made language. Instead it adopted language that by contrast is quite unsuited to the alleged purpose of including track cars within the scope of the Safety Appliance Acts. For that supposed purpose, indeed, the language of § 8 is intolerably cumbersome; for the critical language of that Section consists in the enumeration of four distinct types of conveyances plus "*similar*" vehicles. Track cars are *dis*similar to them all in almost every way.

This Court has assumed that the quoted language of § 8 could not have been broader and therefore gave it the construction that Congress had explicitly given only to "vehicles." The effect is to attribute to Congress ignorance of its own action in 1866 and thereby to make mere surplusage of its meaningful words "trains, locomotives, tenders, cars" and "similar." It is manifest, however, in view of the statutory defini-

tion of "vehicle," that those words could not have been surplusage.

In this particular—which is basic to the result of the *Jackson* case—the Court's decision was rendered without the benefit of advice as to the existence of a relevant statute. For this reason alone the decision should be reconsidered.

Point 3

THE DECISION IS IN EFFECT A LEGISLATIVE ACT PRODUCING DRASTIC CONSEQUENCES AND IT SHOULD THEREFORE BE VACATED.

The decision of this Court holds that the Safety Appliance Acts have extended to maintenance-of-way vehicles since 1903. Such is its literal technical meaning.

Viewed in its practical aspects, however, the decision has every effect that new legislation by Congress would have. There is no previous decision squarely in accord with the present decision, with the exception of a single state case involving a different safety appliance. The essentially legislative nature of the decision is even more apparent when it is remembered that the Interstate Commerce Commission, charged with the duty of enforcing these Acts, has never taken any steps to discharge that duty by applying the Acts to track maintenance vehicles of the kind here involved. These points have already been made in the briefs filed by the petitioner and by the Commission as *amicus*, and we do no more than mention them here in order to demonstrate the precipitous change in the law attendant upon this decision.

The Association of American Railroads is responsible for the legislative interests of its members. It has for years been registered under the Federal Regulation of Lobbying Act (2 U.S.C. §§ 261-270). For that reason it has a direct interest in and concern with all

legislation that may affect railroads. It is familiar with the process by which Congressional acts are passed.

It is gravely concerned with the effect the present decision will have on the industry. It respectfully submits that the Court's action is based on evidence that is insubstantial as compared to the factual material customarily presented by interested parties to Congressional committees when legislation is before them. Moreover, it is certain that had Congress passed a statute to that effect, it would have allowed a reasonable time for the railroads to conform to its provisions. Compare the authority for extending time for compliance embodied in § 7 of the first Safety Appliance Act, 27 Stat. 532 (1893).

The history of the Acts affords a close parallel to the present case. It demonstrates the unsoundness and ultimate ineffectiveness of legislative decisions such as this.

In *American R. R.* v. *Didricksen,* 227 U.S. 145, decided in January 1913, this Court held that the Safety Appliance Acts extended to Puerto Rico. Neither the Interstate Commerce Commission nor the affected railroads had theretofore considered the Acts to be so applicable. See *In the Matter of Safety Appliances on Equipment of Railroads in Porto Rico,* 37 I.C.C. 470, 471 (1915).

In April 1913, less than three months after the *Didricksen* decision had been handed down, the Commission suspended this application of the Acts and began an investigation of the matter which culminated some two and one-half years later in the Commission decision last above cited. The investigation disclosed that the Safety Appliance Acts should not, as a practical matter, have applied to cane cars, the largest single category of freight cars owned by the Puerto Rican

railroads. See 37 I.C.C. at 475. The Acts never became effective in Puerto Rico because the Commission's suspension order remained in force until the *Didricksen* case was in effect reversed by the Act of March 2, 1917, 48 U.S.C. § 751. See *Camunas* v. *Porto Rico Ry., Light & Power Co.*, 272 Fed. 924, 930 (1st Cir. 1921).

This Court's decision in the *Didricksen* case, futile though it was, depended in large part on the correct construction of statutes that were basic to the establishment of American government in Puerto Rico. The present decision, depending solely on an erroneous construction of the Safety Appliance Acts, derives no such collateral support from the construction of other statutes.

There are two other major differences between the *Didricksen* situation and that of the present case:

First, it is uncertain whether the Commission has authority to suspend the effect of this decision as it did with respect to Puerto Rico. *Cf. Illinois Central R.R.* v. *Williams*, 242 U.S. 462 (1917).

Second, the *Didricksen* case affected only nine narrow-gauge railroads operating but 335 miles of track with 77 locomotives and 2,813 cars. See 37 I.C.C. at 474-475. The present decision affects more than 100 major American railroads operating more than 350,000 miles of track (see ICC Statistics of Railways in the United States, 1955) and using about 60,000 motor track cars (R. 78) as well as an undetermined number of other maintenance-of-way vehicles.

If motor track vehicles must have train or power brakes, automatic couplers and perhaps standard drawbars when hauling other track vehicles, then the railroads must either 1) install them, at great expense, to the detriment of their employees, 2) urge passage of an appropriate amendment to the Acts, 3) ma-

terially change methods of track maintenance; or 4) give up maintenance of way.

The fourth course would be unthinkable, for the railroads cannot operate unless their tracks and roadbeds are constantly kept up. But none of the other three courses could be put into effect without considerable lapse of time. No matter which of these three choices the railroads adopted, therefore, they would be forced to violate the Acts for months or perhaps years, thus unavoidably subjecting themselves to fines under 45 U.S.C. § 6 or § 13. It is plain, therefore, that the decision forces the railroads into a dilemma from which there can be no satisfactory extrication.

In adopting the Safety Appliance Acts, Congress could not have intended to force the railroads first to violate the Acts and thereafter to spend large sums of money in order to imperil their employees. That is what the decision requires. It is plainly wrong. The Court should not permit it to stand.

III

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Court in this case should be reheard and vacated and that the judgment of the Court of Appeals for the District of Columbia Circuit should thereupon be reversed.

Respectfully submitted,

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Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and accompanying Brief have this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first class mail, postage prepaid. Copies thereof have also been so mailed to the Solicitor General, Department of Justice, Washington 25, D.C., and the General Counsel of the Interstate Commerce Commission, Washington 25, D. C.

June 7, 1957

EDWARD G. HOWARD
Counsel for The Association of American Railroads,
Amicus Curiae